ILE COPY

FILED
APR 16 1953
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 723

L. E. (PRINCE) WALES, DOING BUSINESS AS WALES TRUCKING COMPANY; L. C. JONES TRUCKING COMPANY, INCORPORATED, PARKHILL TRUCK COMPANY, AND H. J. JEFFRIES TRUCK LINE,

Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

STATEMENT AS TO JURISDICTION

LEONARD E. ROACH,
T. S. CHRISTOPHER,
M. WARD BAILEY,
Counsel for Appellants.

INDEX

Subject Index

	Page
Jurisdictional statement	1
Appendix "A"—Opinion of the United States District Court for the Northern District of Texas, Dallas Division, in a Suit to Set Aside, Annul, and Cancel Certain Orders of the Interstate Commerce Commission	3

Table of Cases Cited

Atchison, Topeka and Santa Fe Railroad Case, 284 U.S. 241	2
Wales, L. E. (Prince), doing business as Wales Trucking Company, et al. v. United States of America, et al., I.C.C. Docket No. MC 1554 (Sub. 7), I.C.C. Docket No. 108944 (Sub. 7)	1

Statutes and Other Authorities Cited

Administrative Procedure Act:	
Section 7	1
Section 7(d)	2
Section 8	1
Section 10(e)	1
Organization and Assignment of Work, Interstate Commerce Commission General Order, Paragraph 0.4a (12 F. R. 3228)	1
United States Code, Title 28:	
Section 1253	1
Section 2101(b)	1
Section 2325	1

JURISDICTIONAL STATEMENT

In compliance with Rule 12 of the Revised Rules of the Supreme Court of the United States the Appellants submit herewith their statement showing the basis of the jurisdiction of the Supreme Court to entertain the appeal in this cause:

1. The statutory jurisdiction of the Supreme Court to review by direct appeal the judgment here complained of is conferred by 28 U.S.C. 1253, 2101(b) and 2325.

2. The judgment of the District Court sought to be reviewed was entered on the 2nd day of January, 1953, and the application for appeal was filed on the 11th day of February, 1953, and is presented to the District Court herewith to-wit, on the 11th day of February, 1953.

This suit was brought to set aside certain orders of the Interstate Commerce Commission dated May 7, 1952 under Docket No. MC 1554 (Sub. 7) and seventeen (17) other applications and Docket No. MC 108944 (Sub. 7) and for permanent injunction to enjoin issuance of certificates of convenience and necessity to nineteen motor carriers. The reasons assigned by Complainants to support their charge of invalidity of said orders were: (a) the disqualification of the Examiner under the Administrative Procedure Act that objection having been raised before and overruled by said Commission, which fact makes particularly pertinent and applicable Commission General Order, "Organization and Assignment of Work", or amended (12 F. R. 3228), paragraph 0.4a, eliminating any question of waiver and requiring application of the mandatory requirements of Sections 7, 8 and 10(e) Administrative Procedure Act; (b) that the Commission exceeded its statutory authority; (c) that said Commission failed to make basic findings of fact to support its ultimate conclusion; (d) the prejudicial action of the Examiner and of the Commission in consolidating numerous applications for hearing upon single records; (e)

the comingling of the evidence in different records of evidence and the consideration thereof as if applicable to each separate application contrary to Section 7(d) of the Administrative Procedure Act and contrary to judicial concept of fair hearing; (f) the orders are not supported by substantial evidence, including the novel question arising as to what constitutes substantial evidence in the application of that rule to eighteen or nineteen proceedings when disposed of in one order; (g) denial of the right of cross examination by the erroneous admission by the Examiner of Exhibit 50 particularly where the order of the Commission in context shows upon its face that in the entry of said orders that said Commission relied substantially, if not entirely, upon matters contained in said Exhibit, and (h) that particularly in view of the speculative character of the evidence and the mere forecast of the Commission in a field wherein it was not exercising its expertise that the record was stale, requiring the application of the doctrine of the *Atcheson, Topeka and Santa Fe Railroad* case, 284 U. S. 241, petition having been filed seeking such rehearing and offering to introduce evidence prior to final determination by said Commission.

All Respondents answered. The cause was heard on its merits before a specially constituted District Court, after which said Court rendered an opinion, copy of which is appended hereto. Judgment was entered for the Respondents dismissing Complainants' bill.

The jurisdiction of the District Court is sustained under 49 U. S. C. 2321, *et seq.*

Respectfully submitted,

LEONARD E. ROACH,
T. S. CHRISTOPHER,
M. WARD BAILEY,
Counsel for Appellants.

BLEED THROUGH, POOR COPY

APPENDIX "A"

SUIT TO SET ASIDE, ANNUL, AND CANCEL CERTAIN ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Leonard E. Roach, Oklahoma City, Oklahoma; T. S. Christopher, Fort Worth, Texas, for Complainants.

Isaac K. Hay and Edward M. Reidy, Washington, D. C., for Interstate Commerce Commission.

Joe E. Shaw, Houston, Texas, for Newsom Truck Line, Inc.

Ralph Currie, Dallas, Texas; E. H. Muse, Jr., and Morgan Nesbit, Austin, Texas, for thirteen of the Truck Lines.

Newell A. Clapp; James E. Kilday, and E. Riggs McConnell, Special Assistant Attorneys General, Washington, D. C.

Callaway & Reed, and Rollo E. Kidwell, Dallas, Texas, for five of the defendant trucking companies.

Before Joseph C. Hutcheson, Jr., Chief Judge, Circuit Court of Appeals, William H. Atwell, Chief Judge, District Court, and T. Whitfield Davidson, District Judge

ATWELL, *Chief District Judge:*

This suit was filed July 2, 1952.

There are four complainant trucking companies against twenty-two respondents, two of which respondents are the United States, and the Interstate Commerce Commission. The respondents, other than the United States and the Interstate Commerce Commission, are alleged to reside in the Dallas division of the Northern District; Oklahoma City, Oklahoma; Tulsa, Oklahoma; Odessa, Texas; Kilgore, Texas; Big Spring, Texas; Wichita Falls, Texas; Fort Worth, Texas; Houston, Texas; Gainesville, and Burkburnett, Texas.

The complainants allege that the respondents held certificates issued by the Interstate Commerce Commission, authorizing operations in interstate and foreign commerce in varying territories, but usually to serve in the states of Texas, Oklahoma, New Mexico, and Kansas, though some

of them held authority to operate in such other states as Arkansas, Louisiana, Mississippi, Alabama, Georgia, Florida, and other states. That in the latter part of 1948 the respondent carriers filed applications seeking authority to operate also to points and places in the states of Colorado, Wyoming, Utah, Arizona, Idaho, Montana, and Nebraska, and also to operate from and between points in the states of Colorado, Wyoming, Utah, Arizona, Idaho, Montana, and Nebraska.

The commodities which they sought authority to transport were, (A) Machinery, equipment, materials and supplies used in, or, in connection with the discovery development, production, refining, manufacture, processing, storage, transmission, and distribution of natural gas and petroleum and their products and by-products. (b) Machinery, equipment, materials, and supplies used in, or, in connection with the construction, operation, repair, servicing, maintenance, and dismantling and picking up thereof.

Hearings were had upon said applications in April, 1949, in Dallas, to June 20, 1949, when concluded, at Denver, by Clarence E. Simmons, as the Examiner.

That all the applications of the defendant motor carriers for these additional certificates, were separate, and the Examiner, for the purpose of convenience and conserving time and work, consolidated the applications insofar as the hearing was concerned. That the testimony would be taken for, or, against either application, and would be applicable to such other applications as were pertinent. That the testimony of each witness would be specifically directed to the application, or, applications, which he supports.

Twelve of the applications were heard on such consolidated record, and, subsequently, six additional applications were heard on a consolidated record.

The respondent Newsom Truck Line application was heard separately. Testimony in the Newsom case was taken at Houston on May 2, 1949, and concluded at Denver on June 28, 1949.

On March 27, 1950, the Examiner denied the applications of all the respondents.

The Examiner also denied the application of the Norris Motor Lines.

Thereafter, Division No. 5 consolidated all of the eighteen applications, and issued one report covering all eighteen applications and authorized the issuance of the certificate to each of the eighteen applicants. This report was dated June 11, 1951. On the same date, the Newsom Truck Line was also granted a certificate.

It reported that such certificates were issued on the increase in oil field activity in the states heretofore mentioned.

At the time of such issuance, the complainant Wales was authorized to transport the commodities described, between points in Kansas, Oklahoma and Texas, and between points in Illinois and Missouri, and points in Colorado, Kansas, Nebraska, Oklahoma, and Texas, and between points in Kansas, South Dakota, North Dakota, Wyoming, Montana, Oklahoma, Colorado, Illinois, Indiana, Kentucky, Missouri, Nebraska, and Texas, as well as for heavy machinery and other commodities which required the use of special equipment from points in Colorado, Illinois, Kansas, Missouri, Nebraska, and Oklahoma, as well as commodities, which, because of size, or, weight, required special equipment and related parts, between points in Kansas and points in North Dakota, South Dakota, Montana, Wyoming, Utah, New Mexico, and Texas.

Complainant Jones, Inc., or its predecessor, L. C. Jones, held certificates authorizing the transportation of the commodities described, between points in Colorado, Kansas, Oklahoma, Louisiana, New Mexico, Texas, and Wyoming, and between points in Montana, Utah, and between points in Kansas, Oklahoma, and Texas, being machinery and machinery parts, other than oil field machinery and parts, which, because of size, or, weight, required special handling, or, rigging, from points in Oklahoma and Texas, to points in Arkansas, Colorado, Kansas, and Texas.

Complainant Park Hill Trucking Company held certificates authorizing transportation described above, in paragraphs (a) and (b) between points in Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Missouri, Nebraska, New Mexico, Oklahoma, Texas, and Wyoming. It also was authorized to transport pipe, pipeline material, machinery and equipment incidental to, and, used in connection with the construction, repairing, or, dis-

mantling, pipelines, between points in Oklahoma, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

Complainant Jeffries Trucking Company, Inc., held authority on substantial portions of the service which applicants proposed in case their applications are granted.

After the granting of the certificates to the defendant motor carriers, the entire Commission overruled petitions for rehearing, in which the complainants alleged that there was no present need for the services proposed by the respondents and that the evidence submitted to the Examiner was of a highly speculative character.

They also alleged that they were entirely capable of rendering all services required as motor carriers in the involved territory.

The complainants also allege that the authority of the Interstate Commerce Commission in issuing licenses to the respondents was in violation of statutory authority, arbitrary, unreasonable, unjust, and without support of evidence, and contravenes the National Transportation policy.

They also attack the hearings as being null and void, and that large scale development is highly speculative, and that public convenience and necessity does not require the anticipated service ordered and allowed by the Commission.

Further, that the applications of Farmer & Company and Newsom Truck Lines, Inc., made use of the evidence that was offered in other respondents' hearings.

Immediate and irreparable injury and damage is alleged without a reasonably adequate remedy at law.

Permanent injunction setting aside and cancelling the orders complained of is prayed.

Voluminous testimony, covering thousands of pages, was introduced in the hearing before us, and such testimony discloses that there is ample testimony to support the findings of the Commission in overuling the recommendation of the Examiner, and in granting the certificates sought. Such testimony included persons entirely familiar with the incoming oil fields in the mentioned states, and with the

BLEED THROUGH POOR COPY

exception of one or two of such states, and with the vast number of trucks that are required to carry heavy oil drilling and oil developing machinery. Also covering leases that had been made in these particular territories, which, of course, carry expiration dates and necessity for development without delay.

We must conclude that there is ample testimony to support the findings of the Commission. We have no authority to look into the testimony, save for the purpose of discovery whether there is testimony which supports the findings.

As to the attack which is made upon the Examiner, it will be noted that the Examiner found for the complainants, and against the applicants. That there was no attack upon the appointment of the Examiner, nor upon his fairness, nor judicial demeanor. In truth, the record contains compliments that were passed upon him by the Complainants because of his accuracy and fairness.

Thus, evidencing, as the record discloses, their complete satisfaction with him, and they may not now successfully attack the hearings which he held, the manner, the testimony which he heard, and the highly sensible method pursued by him in hearing and preserving the testimony offered by all sides.

The Tucker case, originally reported in 100 F. (s) 432, was reversed by the United States Supreme Court, 344 U. S. 33, and the complainants would be estopped now to raise such question, even were there any ground.

We do not understand that the words, "convenience," and "necessity," are to be bounded and limited by any authority, save and except Interstate Commerce Commission. Nor do we understand that it is the overall purpose of the Transportation Act which authorized more carriers in Interstate Commerce was intended to build a monopoly. No one can study the great oil sands which come down from Montana all through the states involved here, into Colorado, and on down through Texas, without realizing that the development which is now taking place there, and which is being richly rewarded by paying wells, can be expected to be satisfied and sufficiently supplied by motor carriers as now licensed. That very question was a controversial one

and it had been settled by the satisfactory amount of evidence which was considered by the Commission.

Able briefs, with a complete exhaustion of applicable decisions, have been filed by both parties, but there are but two militant attacks. Those relate to the consolidation of the hearings by the Examiner, which, as already stated, were all right so long as the Examiner was recommending against the granting. That attitude may not be taken by a litigant after the work has been done in a manner that was quite acceptable to the litigant and resulted in compliments.

The practice of consolidating has been approved in Central Transfer Co., v. Term. R. R. Co., 288 U. S. 469; Trade Commission v. Cement Institute, 333 U. S. 683; Greyhound Corp. et al., 57 M.C.C. 123; Meeker v. Lehigh Valley, 236 U. S. 434, and Akron, C. & Y. R. Co. v. United States, 22 F. (2d) 199. Such eliminates costly duplication in the presentation of evidence and affords opportunity of more expeditious disposition of proceeding; T. E. Mercer, et al.—Oil Field Commodities, 46 M.C.C. 845. In that case thirty-one applications were before the Commission and were heard on a consolidated record. U. S. et. al. v. Peirse Auto Freight Lines, 327 U. S. 515.

Protestation was made at that time, charging that it was arbitrary, capricious, and prejudicial, but the Commission said, "It is the duty of the joint Boards and Examiners to develop such procedure in cases before the Commission as will complete the taking of evidence with expedition and economy, without prejudice to the rights of the parties. The respective joint Board members were present at, and actively participated in the proceeding, and in the disposition of the applications assigned them. A very large portion of the evidence adduced applies equally to all of the applications. All parties were afforded the opportunity of a full direct or cross examination of the witnesses. There is no provision in the Interstate Commerce Act which prohibits the hearing of related joint Board and Examiner cases upon a consolidated record. In the circumstances, it does not appear that any of the parties were, under the procedure adopted, deprived of any substantial rights in the proceedings." Language that is definitely appropriate here.

The admission into evidence of Exhibit 50 was not in our opinion prejudicial error, both because it was prepared and written as quasi-public document in the oil industry, antelitem motem, and because, in proceedings before administrative bodies, strict rules of evidence are not absolutely controlling and will form no basis for reversal in the absence of the document and the comments of the commission with respect to it, we think it clear that its admission constitutes no basis for reversal.

The only other point that remains, has, likewise, been mentioned, and it relates to the quantum supporting the action of the Commission and the granting of the certificates.

The Commission, through the application of its expert judgment and experience in, and knowledge of, interstate transportation matters, is the final arbiter upon whether or not additional motor carrier service is required. Public transportation is not something that can belong to an applicant. It is established and determined by proof of conditions which exist in the territory to be served.

The testimony showing the trend of new development and exploration in oil fields, with their extensive acreage and outstanding leases, and large-scale exploratory operations together with the great production, furnishes a substantial foundation for the judgment of the Commission. United States v. Carolina Freight Carriers, 315 U. S. 475; Warehouse Co. v. United States, et al., 321 U. S. 67; Capitol Transit Co. v. United States et al., 97 F. (s) 614; Long Transportation Corp. et al. v. United States, et al., 75 F. (s) 918; Interstate Commerce Commission, et al. v. Parker, et al., 326 U. S. 60.

It follows that the complaint must be dismissed. Suitable order to that effect may be prepared and presented by counsel.

(S.) Joseph C. Hutcheson, Jr.,
United States Circuit Judge;
(S.) William H. Atwell,
United States District Judge;
(S.) T. Whitfield Davidson,
United States District Judge.